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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN
Appellants,

v.

WILLIAM D. SWACKHAMER,
Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA,
Intervenor,
Appellees.

On Appeal From the Supreme Court of Nevada

JURISDICTIONAL STATEMENT

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October 18, 1978

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Appellees.

On Appeal From the Supreme Court of Nevada

JURISDICTIONAL STATEMENT

Isabel Kimble, Bruce Blackadar, Mary Frazzini, Theodore Oleson, Jr., and Marjorie da Costa Eastman, Appellants, appeal from the final judgment of the Supreme Court of Nevada, dated September 19, 1978, holding, in a divided opinion, that Chapter 174 of the 1977 Statutes of Nevada—which statute directs the holding of an advisory referendum on the question of whether the legislature of Nevada should ratify the proposed Equal Rights Amendment—is not repugnant to Article V of the Constitution of the United States.

OPINIONS BELOW

The divided opinion of the Supreme Court of Nevada, dated September 19, 1978, which appears in the appendix hereto, p. 1a, *infra*, has not yet been reported.

The opinion of the First Judicial District Court of Nevada, dated January 31, 1978, which appears in the appendix hereto, p. 9a, *infra*, is not reported.

JURISDICTION

The judgment of the Supreme Court of Nevada, affirming the grant of summary judgment in favor of Appellees by the First Judicial District Court of Nevada, is a final judgment by the highest Court for the State of Nevada and was entered on September 19, 1978. See p. 1a, *infra*. On October 2, 1978, Appellants filed with the Supreme Court of Nevada a motion seeking an injunction against Appellee Swackhamer, Secretary of State of the State of Nevada, prohibiting him from placing the advisory question on the November 7, 1978, general election ballot pending Appellants' filing of a Jurisdictional Statement with this Court and the Court's resolution of this appeal. (See p. 12a, *infra*.) Appellants' Motion was denied by the Supreme Court of Nevada on October 13, 1978.

A notice of appeal to this Court was duly filed in the Supreme Court of Nevada on October 2, 1978. See p. 14a, *infra*.

This appeal is being docketed in this Court within 90 days from the entry of judgment by the Supreme Court of Nevada. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether Chapter 174, Nev. Stat., 1977, which provides for an advisory referendum on the question of whether the Legislature of Nevada should ratify the proposed Equal Rights Amendment, is repugnant to Article V of the United States Constitution because it alters the mode of ratification of a proposed constitutional amendment by a) providing for citizen participation in the amendatory process through the State's electoral machinery, b) requiring the Nevada Legislature to defer action on ratification until it receives the advice and recommendation of the Nevada voters, and c) deferring any action on ratification by the Legislature until after the next regularly scheduled election of Nevada legislators.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article V, Constitution of the United States:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several states, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided, that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Chapter 174, Nevada Statutes, 1977:

CHAPTER 174

AN ACT relating to a proposed amendment to the United States Constitution; providing an advisory referendum on ratification of the equal rights amendment; and providing other matters properly relating thereto.

[Approved April 12, 1977]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. At the general election on November 7, 1978, an advisory question shall be submitted to the registered voters of this state on the ratification of the proposed amendment to the Constitution of the United States, commonly known as the equal rights amendment.

SEC. 2. At the time and in the manner provided by law, the secretary of state shall transmit the question to the several county clerks, and the county clerks shall cause it to be published and posted as provided by law.

SEC. 3. The proclamation and notice to the voters given by the county clerks pursuant to law shall be in substantially the following form:

Notice is hereby given that at the general election on November 7, 1978, an advisory question will appear on the ballot relating to the ratification of the following proposed amendment to the United States Constitution:

1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

3. This amendment shall take effect two years after the date of ratification.

THE RESULT OF THE VOTING ON THIS QUESTION DOES NOT PLACE ANY LEGAL REQUIREMENT ON THE LEGISLATURE OR ANY OF ITS MEMBERS.

SEC. 4. The ballot page assemblies and the paper ballots to be used in voting on the advisory question shall present the question in substantially the following form:

Do you recommend that the Nevada legislature ratify the following proposed amendment to the United States Constitution, commonly known as the equal rights amendment?

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Sec. 3. This amendment shall take effect two years after the date of ratification.

YES ..... NO .....

SEC. 5. The explanation of the question which shall appear on each paper ballot and sample ballot and in every publication and posting of notice of the question shall be in substantially the following form:

(Explanation of the Advisory Question)

Nevada has not yet ratified the "Equal Rights Amendment" to the United States Constitution. A "Yes" vote on this advisory

question would recommend that the Nevada legislature take action to ratify that amendment. A "No" vote on this advisory question would recommend that the Nevada legislature refrain from taking action to ratify that amendment.

THE RESULT OF THE VOTING ON THIS QUESTION DOES NOT PLACE ANY LEGAL REQUIREMENT ON THE LEGISLATURE OR ANY OF ITS MEMBERS.

SEC. 6. If a majority of the votes cast on the question is yes, the secretary of state shall certify the result to the president of the senate and the speaker of the assembly as the recommendation of the registered voters of the state, that the proposed amendment to the Constitution of the United States be ratified by Nevada. If a majority of the votes cast on the question is no, the secretary of state shall certify the result as the recommendation of the registered voters of the state, that the legislature should not ratify the amendment.

SEC. 7. All general election laws not inconsistent with this act are applicable.

SEC. 8. The question required by this act shall not be placed on any ballot, nor shall any other action which is required by this act be taken, if:

1. The Nevada legislature has ratified the proposed amendment on or before July 1, 1977; or

2. The legislatures of 38 other states have ratified the proposed amendment, and the United States Congress has accepted their ratification, on or before July 1, 1978.

H.J. Res. 208, 92d Cong., 2d Sess. (1972):

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE–

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"SECTION 3. This amendment shall take effect two years after the date of ratification."

H.J. Res. 638, 95th Cong., 2d Sess. (1978):

JOINT RESOLUTION

Extending the deadline for the ratification of the equal rights amendment.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Con-

gress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.

RAISING THE FEDERAL QUESTION

In their Complaint, filed with the First Judicial District Court of Nevada, and at each available opportunity thereafter, Appellants raised the claim that Chapter 174 of the 1977 Statutes of Nevada was repugnant to Article V of the Constitution of the United States. The First Judicial District Court of Nevada found that the Complaint was "for the purpose of challenging the constitutionality of Chapter 174, Statutes of Nevada 1977" and ruled that, since it is not binding upon the legislature, the referendum is not part of the ratification process and, therefore, is not contrary to Article V. On appeal of that decision, the Supreme Court of Nevada found: "At issue is the constitutionality of Chapter 174, 1977 Nev. Stats.". The Supreme Court of Nevada, in a divided opinion, ruled that, since the referendum is advisory in nature and not binding upon the Nevada legislators, Chapter 174 is not contrary to Article V.

STATEMENT OF THE CASE

The facts which are relevant to this appeal are not in dispute and may be fairly summarized as follows:

(1) On March 22, 1972, the Congress of the United States, by a two-thirds majority in each body, adopted H.J. Res. 208, 92d Cong., 2d Sess. (1972), which proposed to the several states the adoption of the Equal

Rights Amendment. 118 Cong. Rec. 9598 (March 22, 1972).

(2) Between March 22, 1972 and the filing of the Complaint in the instant action, thirty-five (35) states had ratified the proposed Equal Rights Amendment. Thirty-eight (38) state ratifications are necessary before the proposed Equal Rights Amendment can become a part of the Constitution of the United States. Currently, fifteen (15) states have not yet ratified the proposed amendment. These states are: Alabama; Arizona; Arkansas; Florida; Georgia; Illinois; Louisiana; Mississippi; Missouri; Nevada; North Carolina; South Carolina; Oklahoma; Utah; and Virginia.

(3) On October 5, 1978, the Congress of the United States extended the ratification period for the proposed Equal Rights Amendment from March 29, 1979 to June 30, 1982. H.J. Res. 638, 95th Cong. 2d Sess. (1978).

(4) On April 12, 1977, the Nevada legislature approved Assembly Bill No. 301 which is now known as Chapter 174 of the 1977 Statutes of Nevada. The Statute was signed by the Governor of Nevada. Chapter 174 is entitled:

> AN ACT relating to a proposed amendment to the United States Constitution; providing an advisory referendum on ratification of the equal rights amendment; and providing other matters properly related thereto.

(5) Chapter 174 provides that, on November 7, 1978, an advisory question on the issue of whether the proposed Equal Rights Amendment should be ratified by the Nevada legislature be presented to the registered

voters of the State of Nevada. Both Section 3 and Section 5 of Chapter 174 provide that:

> The result of the voting on this question does not place any legal requirement on the legislature or any of its members.

(6) Section 6 of the Chapter 174 provides that the Secretary of State of Nevada shall certify the result of the referendum to the President of the Senate of Nevada and the Speaker of the Assembly of Nevada.

(7) Section 8 of Chapter 174 provides that the advisory question will not be placed on the November 7, 1978 ballot if: (a) the Nevada legislature ratifies the proposed Equal Rights Amendment on or before July 1, 1977 or (b) the legislatures of 38 states ratify and such ratifications are accepted by the United States Congress on or before July 1, 1978. Neither contingency has occurred and the advisory question will be placed on the November 7, 1978 ballot.

(8) In the November 7, 1978 general election in Nevada, the entire General Assembly and one-half of the State Senate will be elected.

(9) On November 8, 1977, Appellants as taxpayers, citizens, and voters of the State of Nevada, filed a Complaint with the First Judicial District Court of the State of Nevada seeking a declaratory judgment that Chapter 174 violated Article V of the Constitution of the United States and further seeking to enjoin Appellee Swackhamer from causing the advisory question to be placed on the November 7, 1978 ballot. On January 31, 1978, upon consideration of the parties' cross motions for Summary Judgment, Plaintiffs' Motion for

Preliminary Injunction and oral argument, the First Judicial District Court granted Appellees' Motion for Summary Judgment holding that, since the vote on the advisory question is not binding, the referendum is not a part of the ratification process and thus does not violate Article V.

(10) Appellants appealed the decision of the First Judicial District Court to the Supreme Court of Nevada. Appellants reasserted their claim that Chapter 174 was an unconstitutional interference with the amendatory process set forth in Article V of the Constitution of the United States. On September 18, 1978, the Supreme Court of Nevada, in a divided opinion, affirmed the First Judicial District Court holding that Chapter 174 was not violative of Article V because it is advisory in nature and does not bind the legislators in their decision as to whether or not to ratify the proposed Equal Rights Amendment.

(11) On October 2, 1978, Appellants filed notice of appeal to this Court with the Supreme Court of Nevada. On the same day, Appellants filed a Motion with the Supreme Court of Nevada seeking an injunction against Appellee Swackhamer prohibiting him from placing the advisory question on the November 7, 1978 ballot pending Appellants' filing of a jurisdictional statement with this Court and this Court's resolution of the controversy over the constitutionality of Chapter 174. Appellants' Motion was denied by the Supreme Court of Nevada on October 13, 1978.

(12) Appellants are filing, under separate cover, a Motion for affirmative relief pending review with the appropriate Justice of this Court.

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal, whether a state statute providing for an advisory referendum on a proposed Constitutional amendment violates Article V of the United States Constitution because such statute impermissibly alters the mode of ratification, is a substantial question with profound and important implications. The precise issue has never been addressed by this Court.

Amendment of the United States Constitution is an exclusively Federal process which is controlled entirely by Article V of the United States Constitution. *Hawke* v. *Smith,* 253 U.S. 221 (1920); *National Prohibition Cases,* 253 U.S. 350 (1920). By their adoption of the United States Constitution, and specifically Article V, the several states and their citizens divested themselves of any right to participate in the amendatory process. As this Court stated in *Hawke* v. *Smith,* 253 U.S. 221, 230 (1920):

> . . . the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.

Under Article V, the citizens of the several states have been totally excluded from participation in the amendatory process. *Hawke* v. *Smith,* 253 U.S. 221 (1920). Participation by the several states is limited to the vote of the legislatures (or conventions) on the text of amendments proposed by Congress (or a convention called by Congress). *Leser* v. *Garnett,* 258 U.S. 130 (1922). Ratification by the state legislatures, moreover, is not a legislative act. It is, instead, ". . . the expression of assent of the State to a proposed amendment," *Hawke* v. *Smith,* 253 U.S. at 229, and this "expression of assent", through ratification, "transcends any limitations sought to be imposed by the people of a State". *Leser* v. *Garnett,* 258 U.S. at 137.

Neither the citizens, through their state constitutions, nor the legislatures of the several states, through statute, can alter the mode of ratification of proposed amendments to the United States Constitution by injecting citizen participation into the amendatory process or otherwise placing conditions or limitations upon the legislature relative to ratification. *Hawke* v. *Smith,* 253 U.S. 221 (1920); *Leser* v. *Garnett,* 258 U.S. 130 (1922); *Opinion of the Justices Relative to the Eighteenth Amendment,* 262 Mass. 603, 160 N.E. 439 (1928); *Prior* v. *Noland,* 68 Colo. 263, 188 P. 729 (1920); *State ex rel. Tate* v. *Sevier,* 333 Mo. 622, 62 S.W. 895 (1933); *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972); *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973).

In *Hawke* v. *Smith,* 253 U.S. 221 (1920), this Court ruled that it was unconstitutional, under Article V, for the State of Maine to subject the ratification of a proposed constitutional amendment by the Maine legislature to a popular referendum. Similarly, the Supreme Courts of a number of states which have considered the question have uniformly found it to be repugnant to Article V for a state to inject citizen participation into the amendatory process by means of a popular referendum. *Prior* v. *Noland,* 68 Colo. 263, 188 P. 729 (1920); *In re Opinion of the Justices,* 188 Me. 544, 107 A. 673 (1919) *aff'd sub. nom. Hawke* v. *Smith,* 253 U.S. 221 (1920); *Gill* v. *Morris,* 79 Okla. 89, 191 P. 364 (1920); *Hatch* v. *Murray,* 165 Mont. 92, 526 P.2d 1369 (1974); *Barlotti* v. *Lyons,* 182 Cal. 575,

189 P. 282 (1920); *Herbring* v. *Brown,* 92 Ore. 176, 180 P. 328 (1919); *State ex rel Tate* v. *Sevier,* 333 Mo. 622, 62 S.W. 2d 895 (1933).

The exclusion of citizen participation in the amendatory process which Article V requires has been found to be equally applicable where the referendum in question was advisory and not binding on the legislators. In *Opinion of the Justices Relative to the Eighteenth Amendment,* 262 Mass. 603, 160 N.E. 439 (1928), the Supreme Judicial Court of Massachusetts relied upon *Hawke* v. *Smith, supra.,* and *Leser* v. *Garnett, supra.,* and held that:

> The voters of the several states are excluded by the terms of Article 5 (sic) of the Constitution of the United States from participation in the process of its amendment. 160 N.E. at 440.

In an effort to circumvent the uniform court rulings that popular referenda on proposed constitutional amendments violate Article V, a number of states have sought to inject popular participation into the process by requiring a deferral of action relative to ratification until the voters of the states have had an opportunity to express their will through the election of legislators. Such efforts have also been uniformly declared violative of Article V. *Leser* v. *Garnett,* 258 U.S. 130 (1922); *Walker* v. *Dunn,* 498 S.W. 2d (Tenn. 1972); *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973).

In *Leser* v. *Garnett,* 258 U.S. 130 (1922), this Court ruled that it was unconstitutional, under Article V, for a state to require its legislature to defer action upon a proposed amendment until after the next regularly scheduled election. The Court found that such a deferral of action amounted to a limitation on the legislature. Relying upon *Hawke* v. *Smith,* 253 U.S. 221 (1920) the *Leser* Court reaffirmed the principle that the function of the legislature in ratifying proposed amendments "transcends any limitations sought to be imposed by the people of a State". *Leser* v. *Garnett,* 258 U.S. at 137. In *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972) and *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973), the *Hawke* and *Leser* decisions were applied to strike down state constitutional provisions that prohibited the legislature from acting on a proposed amendment unless the legislature had been elected after proposal of the amendment.

Well reasoned decisions make it clear that the mode of ratification set forth in Article V is not subject to any modification by the states. This principle applies whether the modification is achieved directly by means of a popular referendum or by more indirect means such as the placing of limitations on a legislature by requiring deferral of action on ratification until the voters have the opportunity to express their opinions on the proposed amendment.

Chapter 174, Nev. Stat., 1977 is yet another transparent attempt by a state to achieve indirectly what the uniform judicial decisions prohibit being done directly, namely, to alter the mode of ratification.[1]

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[1] In its decision, the Supreme Court of Nevada dismissed, without discussion, the one case most directly on point: *Opinion of the Justices Relative to the Eighteenth Amendment,* 262 Mass. 603, 160 N.E. 439 (1928). Rather, the Court below relied entirely upon *Dyer* v. *Blair,* 390 F. Supp. 1291 (N.D. Ill. 1975). The reliance on *Dyer* is misplaced. In *Dyer,* a three-judge court, per Stevens, J., ruled that the Illinois legislature could require a supermajority vote for ratification of a proposed constitutional amendment. In so

Chapter 174 seeks to achieve this change by declaring the referendum to be only advisory. Even if one were to concede that the referendum would not bind the votes of individual Nevada legislators,[2] the fact that the referendum is advisory is of no constitutional significance. In *Leser* v. *Garnett,* 258 U.S. 230 (1922), the deferral of ratification action until the next election in no way bound the legislators; yet, the deferral violated Article V. Neither were the legislators in any way bound in *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972) and *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973), where the states of Tennessee and

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ruling, the Court held that, since Article V did not specify the majority vote required for ratification, the *legislature* of a state *acting as the ratifying body pursuant to Article V* could adopt its own internal procedure as to the requisite majority, just as it could establish the quorum necessary. The *Dyer* Court found that substantial variations existed among the states as to the majority vote required for ratification and, further, that such variations had existed, without objection, since the initial adoption of the Constitution. Yet, the *Dyer* Court also ruled, citing *Hawke* v. *Smith,* 253 U.S. 221 (1920), *National Prohibition Cases,* 253 U.S. 350 (1920) and *Leser* v. *Garnett,* 258 U.S. 130 (1922), that a state, through legislation, or through its Constitution, could not impose a supermajority requirement or any other condition upon the legislature relative to ratification, including popular referenda, because such limitations would affect the mode of ratification. 390 F. Supp. at 1308. Plainly, Chapter 174 does not represent an internal procedure of the Nevada legislature of the type authorized by the *Dyer* Court. Nor is Chapter 174 a longstanding practice of Nevada or other states, as was the supermajority vote requirement for ratification. Instead, Chapter 174 represents an effort to provide for popular participation and limitations on the state legislature which have been condemned by every court which has addressed the issue, including the *Dyer* court.

[2] As the attached documents (pp. 15a-26a *infra.*) demonstrate, numerous Nevada legislators have declared that they intend to be bound by the referendum vote.

Florida prohibited action on ratification unless the acting legislature had been elected after the proposal of the amendment. Indeed, in the one reported case specifically involving an advisory referendum, the Supreme Judicial Court of Massachusetts ruled that the advisory nature of the referendum did not cure the constitutional infirmity. *Opinion of the Justices Relative to the Eighteenth Amendment,* 262 Mass. 603, 160 N.E. 439 (1928).

The constitutional infirmity of Chapter 174 is found in its alteration of the mode of ratification of a proposed constitutional amendment. It achieves this alteration in three ways. First, Chapter 174 resurrects the popular referendum in the amendatory process. The referendum is to be held as part of the general election with the results being reported directly to the State Senate and General Assembly. The vote of the Nevada citizens will, in its practical effect, supplant or, at least, drastically alter the deliberative process of the legislature required by Article V. On this ground alone, Chapter 174 runs afoul of this Court's decision in *Hawke* v. *Smith,* 253 U.S. 221 (1920) as well as the previously uniform decisions of the state Supreme Courts [3] prohibiting alteration of the mode of ratification through popular referenda.

Secondly, Chapter 174 requires the Nevada legislature to defer action on ratification until after it has received the advice and recommendation of the Nevada voters. Under the statutory scheme of Chapter 174, there are only two contingencies which would have

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[3] The Supreme Court of Nevada is the *only* court which has ever authorized the participation of the general public in the ratification process.

absolved the legislature of the requirement to await the advice of the voters. These are a) that the Nevada legislature had ratified prior to July 1, 1977, or b) that thirty-eight states had ratified prior to July 1, 1978. Section 8, Chapter 174, Nev. Stat., 1977. Neither contingency occurred. Thus, unless Chapter 174 is to be viewed as a nullity, having no legal purpose, the Nevada legislature must defer its action on ratification until the voters have spoken. This requirement of deferral until the voters express their will is directly analogous to the limitations on the legislature found unconstitutional in *Leser* v. *Garnett,* 258 U.S. 230 (1922), *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972) and *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973).

The third means by which Chapter 174 alters the mode of ratification is demonstrated by the fact that the entire General Assembly and one-half of the state Senate will be elected in the November 7, 1978 general election. As noted above, Chapter 174 requires deferral of action on ratification until after the general election. Therefore, the effect of Chapter 174 is to defer ratification action until after a new legislative body is elected at the next regularly scheduled election. This limitation on ratification is precisely the type of limitation declared repugnant to Article V by this Court in *Leser* v. *Garnett,* 258 U.S. 230 (1922) and by the courts in *Walker* v. *Dunn,* 498 S.W. 2d 102 (Tenn. 1972) and *Trombetta* v. *Florida,* 353 F. Supp. 575 (M.D. Fla. 1973).

The significance of the decision of the Supreme Court of Nevada goes to the very heart of the Article V ratification processes. It introduces an additional mode of ratification in which the popular will ex-

pressed in an advisory referendum will be persuasive if not decisive. It thus breaks down the uniformity of the ratification process required by Article V. Unless the decision of the Nevada Supreme Court is reversed, it will undermine *Hawke* v. *Smith* and *Leser* v. *Garnett, supra.,* as well as decisions of the state courts which have relied on these cases to strike down efforts to introduce popular electoral opinion into the ratification processes.

In its practical impact, the decision of the Nevada Supreme Court sets the stage in which the vote of the people will supplant the deliberative decision of the legislature. Only an amendment to Article V can properly achieve this result, as was the case with the Seventeenth Amendment to the United States Constitution which transferred the election of the United States Senators from the legislatures of the several states to popular elections within each state.

The Nevada decision will create confusion and disarray. It comes at a time when the Congress has extended the period in which the states may ratify the proposed Equal Rights Amendment and when Congress has submitted for ratification the proposed amendment granting full Congressional representation to the citizens of the District of Columbia. These pending proposed amendments emphasize that the national interest requires that the Supreme Court of the United States review the decision of the Nevada Supreme Court and render a definitive response.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted

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October 18, 1978

APPENDIX

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 10650

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., and MARJORIE DA COSTA EASTMAN, *Appellants,*

vs.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada; and LEGISLATIVE COMMISSION OF NEVADA, Intervenor, *Respondents.*

Appeal from judgment; First Judicial District Court, Carson City; Michael E. Fondi, Judge.
Affirmed.

Phyllis Halsey Atkins, Reno,
for Appellants.

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and Donald Klasic, Deputy,
Carson City,
for Respondent Secretary
of State.

Frank W. Daykin, Carson City,
for Respondent Legislative
Commission.

Opinion

(filed September 19, 1978)

By the Court, THOMPSON, J.:

At issue is the constitutionality of chapter 174, 1977 Nev. Stats., which requires the submission of an advisory question to the registered voters of this state on the ratification of the proposed amendment to the Constitution of

the United States commonly known as the equal rights amendment. It is asserted that the chapter violates article V of the federal constitution. The district court found no constitutional infirmity. For reasons hereafter expressed we agree with that court and, therefore, affirm the judgment entered below.

The advisory question to be presented at the 1978 general election is set out in section 4 of the chapter. It is:

> "Do you recommend that the Nevada legislature ratify the following proposed amendment to the United States Constitution, commonly known as the equal rights amendment?
>
> "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> "Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> "Sec. 3. This amendment shall take effect two years after the date of ratification.
>
> "YES..... NO....."

Section 3 and section 5 of the chapter each expressly state that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." Section 6 directs the secretary of state to certify the result of the votes cast on the question to the president of the senate and the speaker of the assembly as the recommendation of the registered voters of the state. Thus, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote.

Article V of the federal constitution divests the people of authority to themselves ratify amendments to the fed-

eral constitution. Such power is limited to two methods, by action of the legislatures of three fourths of the states, or conventions in a like number of states. Hawke v. Smith, 253 U.S. 221 (1920).[1]

The appellants contend that chapter 174, in practical effect, grants the registered voters of Nevada the authority to ratify the proposed equal rights amendment to the federal constitution since we may presume that the legislature will be governed by the outcome of the advisory vote if, perchance, it recommends ratification. However, the cases upon which they mainly rely in presenting this contention are not supportive. Those cases are Hawke v. Smith, supra, and Leser v. Garnett, 258 U.S. 130 (1922).

Hawke held that there could be no referendum upon the decision of a state legislature to ratify or reject a proposed amendment to the federal constitution. And Leser merely held that the function of a state legislature in ratifying a proposed amendment to the federal constitution was a federal function transcending any limitations sought to be imposed by the people of the state.[2]

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[1] Article V.: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate."

[2] Other cases dealing with a binding referendum on prior legislative action ratifying a proposed amendment to the federal constitution are: Barlotti v. Lyons, 189 P. 282 (Cal. 1920); In re

Chapter 174 does not concern a binding referendum, nor does it impose a limitation upon the legislature. As already noted, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote. The recommendation of the voters is advisory only. In re Estate of Hogan, 146 N.W.2d 257, 259 (Iowa 1966). To recommend does not mean to bind. Fletcher v. Porter, 21 Cal.Rptr. 452, 454 (Cal. D.C.A. 1962). Consequently, we find it wholly impossible to construe chapter 174 as a limitation on legislative power violative of article V of the federal constitution.[3] Rather, the chapter simply specifies a means by which to assist the legislature whether to consent or not to consent to the proposed amendment. The following words of Dyer v. Blair, 390 F. Supp. 1291, 1307 (N.D.Ill. 1975), are apposite to the case at hand:

> "Article V identifies the body—either a legislature or a convention—which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself. This

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Opinion of the Justices, 107 A. 673 (Me. 1919); Decher v. Vaughan, 177 N.W. 388 (Mich. 1920); Hatch v. Murray, 526 P.2d 1369 (Mont. 1974). In each instance, the court found a violation of article V of the federal constitution.

Limitations upon legislative power to ratify or refuse to ratify a proposed federal amendment likewise are in violation of article V. Trombetta v. State of Florida, 353 F.Supp. 575 (M.D.Fla. 1973); State ex rel. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933); Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972).

[3] One case, Opinion of the Justices, 160 N.W. 439 (Mass. 1928), may be read to support the proposition that a non-binding procedure is violative of article V. We reject that opinion as unsound, and not supported by the authorities relied upon by the Massachusetts court.

> conclusion is not inconsistent with the premise that the definition of the term "ratified" is a matter of federal law. The term merely requires that the decision to consent or not to consent to a proposed amendment be made by each legislature, or by each convention, in accordance with procedures which each such body shall prescribe." Affirmed.

/s/ THOMPSON, J.
Thompson

We concur:

/s/ BATJER, C.J.
Batjer

/s/ MANOUKIAN, J.
Manoukian

/s/ MOWBRAY, J.
Mowbray

GUNDERSON, J., *dissenting*:

I respectfully dissent.

I question whether the federal issue could, in any event, be considered correctly decided. Moreover, so far as I can perceive, my colleagues have not explained how it is proper under the Nevada Constitution for our Legislature—through an "Act" obviously intended neither to make nor to modify law, and therefore manifestly outside the Legislature's normal law-making function—to utilize this state's election ballots in ways not contemplated by Nevada's Constitution.

As the Legislative Counsel concedes, in Gibson v. Mason, 5 Nev. 283 (1869), this court declared the Legislature could not properly use the ballots to shift ultimate responsibility for enactment of a proposed law to the voters.[1] *A fortiori*, it would seem the Legislature, by Constitution solely a law-making body, may not pass a non-law requiring an "advisory" vote which binds neither the Legislature nor anyone else, and which defers to a future day decisions on how the vote may be used to shift or dilute legislative responsibiilty.

In Opinion of the Justices Relative to Eighteenth Amendment, 160 N.E. 439 (Mass. 1928), the Supreme Judicial Court of Massachusetts treated a question identical in principle to the one before us, i.e. whether an attempt through initiative petition to order an advisory question onto the State election ballots was proper under the Massachusetts Constitution. Deciding such a directive was an improper exercise of law-making power, the Massachusetts court noted its view that "[t]he precise question is whether it is a 'law' . . ." Holding in the negative, that respected court noted that "the word 'law' imports a general rule

[1] "An act of the legislature made dependent upon their votes or approval would be utterly void—and so it has been frequently held." *Id.* at 293.

of conduct," 160 N.E. at 440, which of course the "Act" of our Legislature, now under consideration, most certainly does not involve. The Court went on to note that the supposed law was

> . . . wanting in features essential to constitute its provisions a law within any permissible conception of the meaning of that word. Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative. The mandate to the secretary of the commonwealth in section 2 to tabulate the returns of the votes and to "transmit copies * * * to each Senator and Representative in Congress from this commonwealth" is subsidiary and incidental to the main purpose of the proposed law; it relates to a matter which standing alone possesses no legal force; it cannot convert into a law something in itself ineffectual.

160 N.E. at 440.

Ms. Atkins, counsel for the E.R.A. proponents, in effect contends this "advisory" referendum is not only unconstitutional on its face, but inherently unfair to historically disadvantaged and therefore relatively underfinanced persons, such as the proponents in this case arguably are. Ms. Atkins notes that rather than being able to concentrate their efforts merely on persuading the Nevada Legislature, as the U.S. Constitution would contemplate, E.R.A. proponents will now be forced to expend important financial resources attempting to win a totally non-binding victory in the November election—under penalty of having defeat used against them during the later, binding struggle in the Legislature.

Moreover, as Ms. Atkins points out, the E.R.A. proponents may well incur disadvantages from the "advisory" referendum—even if statewide vote totals show overall approval of the E.R.A. Election returns will be available

district by district. Hence, arguably some key legislators might be persuaded by the advisory vote to oppose the E.R.A., even if Ms. Atkins' clients succeed in generating general support for the amendment throughout Nevada.

Thus, Ms. Atkins argues in effect, by the improper use of the Nevada election process, the cost of the ratification process contemplated by the U.S. Constitution will be increased, its complexion will be changed, and uncontemplated complexities will be imposed. I agree.

/s/ GUNDERSON, J.
Gunderson

Case No. 38593 Department No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

ISABEL KIMBLE, et al., *Plaintiffs,*

vs.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada, *Defendant.*

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, *Intervenor.*

Findings of Fact, Conclusions of Law and Order

The parties to this action having filed cross motions for summary judgment, with the plaintiffs also filing a motion for preliminary injunction, and the parties having filed their points and authorities and an oral hearing being held thereon on January 30, 1978;

In consideration thereof, and for good cause appearing, this Court hereby makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On November 8, 1977, the plaintiffs filed their complaint for declaratory judgment and preliminary injunction for the purpose of challenging the constitutionality of Chapter 174, Statutes of Nevada 1977.

2. The parties agree that plaintiffs are taxpayers and tax monies will be expended to implement Chapter 174.

3. On December 29, 1977, the defendant and intervener filed a joint motion for summary judgment and on January 13, 1978, the plaintiffs filed motions for summary judgment and preliminary injunction.

4. There are no material facts in dispute, and only issues of law remain to be decided.

Conclusions of Law

1. The plaintiffs, as taxpayers, have the standing to bring this action. Both sides present a justiciable controversy through their adverse interests, and the matter is ripe for adjudication. Therefore, an action for declaratory judgment is proper.

2. Chapter 174 is a "law" within the provisions of Article 4 of the Nevada Constitution. It meets all of the prerequisites of a law with respect to its drafting and approval by the Legislature and its endorsement by the Governor. As a law, it requires and directs certain acts to be performed by the election officers of the state for the purpose of placing an advisory question upon the ballot and to transmit the result of the vote to the Legislature.

3. Chapter 174 is not an initiative or referendum measure and, therefore, does not violate Article 19 of the Nevada Constitution.

4. The nonbinding nature of the advisory question does not make Chapter 174 invalid. All legislation, not expressly prohibited by either the state or federal constitution, may be enacted by the Legislature. Chapter 174 is within the legislative authority vested in the Legislature by Article 4, Section 1 of the Nevada Constitution, since there is nothing in the Nevada Constitution which prohibits the Legislature from placing a non-binding, advisory question on the ballot.

5. Since the vote on the advisory question provided for in Chapter 174 is non-binding and not controlling on the Legislature, and since the Legislature, therefore, is not required to follow the results of the vote on the question of whether the Equal Rights Amendment should be ratified

or not, Chapter 174 is not a part of the ratification process established in Article V of the United States Constitution and thus does not violate said Article V.

6. Plaintiffs are not entitled to either their motion for summary judgment or preliminary injunction.

7. Defendant and intervener are entitled to their motion for summary judgment.

Order

Therefore, in consideration of the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed that:

1. Plaintiff's motions for summary judgment and preliminary injunction are denied; and

2. Defendant and intervener's motion for summary judgment is granted.

Dated this 31st day of January, 1978.

/s/ Michael E. Fondi
Michael E. Fondi
District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 10650

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., and MARJORIE da COSTA EASTMAN, *Appellants*,

vs.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada, and LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, INTERVENOR, *Respondents*.

Motion for Order Restraining Respondents From Causing an Advisory Question Concerning the Equal Rights Amendment To Be Placed on Any Ballot Pending Appeal to the United States Supreme Court

(filed October 2, 1978)

Appellants Isabel Kimble, Bruce Blackadar, Mary Frazzini, Theodore Oleson, Jr., and Marjorie da Costa Eastman, by their attorney, respectfully move the Court for an order restraining Respondent William D. Swackhamer, Secretary of State of the State of Nevada from causing to be placed on the ballot of any general or special election an "advisory" question concerning ratification of the proposed Equal Rights Amendment (as provided in Chapter 174, 1977, Nevada Statutes) until the Supreme Court of the United States has ruled on Appellants' appeal in the above captioned matter. Appellants request that no undertaking or bond be required with respect to this motion. Appellants' grounds for this motion are in the attached Memorandum of Law.

The Court is respectfully urged to grant expedited consideration to this matter so that Appellants will not be prejudiced in their efforts to obtain review by the Supreme Court of the United States.

Respectfully submitted,

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Attorneys for Appellants

By /s/ PHYLLIS HALSEY ATKINS
Phyllis Halsey Atkins

IN THE SUPREME COURT OF THE STATE OF NEVADA

(Caption Omitted in Printing)

Notice of Appeal to the Supreme Court of the United States

(filed October 2, 1978)

NOTICE IS HEREBY GIVEN that Isabel Kimble, Bruce Blackadar, Mary Frazzini, Theodore Oleson, Jr., and Marjorie da Costa Eastman, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nevada, affirming the granting of summary judgment for respondents above, entered in this action on September 19, 1978.

This appeal is made pursuant to 28 U.S.C. § 1257(2).

DATED this 2nd day of October, 1978.

PHYLLIS HALSEY ATKINS
Attorney at Law

By /s/ PHYLLIS HALSEY ATKINS
Phyllis Halsey Atkins
Attorney for Appellants
777 West Second Street
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***Washington Post*, October 11, 1978, p. A-2, Col. 5**

TRADITION POSES OBSTACLE FOR THE PROPONENTS OF ERA INITIATIVE ON BALLOT

By Lou Cannon
Washington Post Staff Writer

RENO, Nev.—When Nevada voters go to the polls Nov. 7, they will be asked to repeal a long-ignored state constitutional provision prohibiting women and persons who have engaged in duels from holding public office.

Passage of the initiative is not in doubt. But its presence on the Nevada ballot is testimony to the obstacle of tradition that faces sponsors of the Equal Rights Amendment here as they try to win approval of another ballot provision favoring ERA.

The Church of Jesus Christ of Later-day Saints (Mormon) is adamantly opposed to the amendment, and its members constitute and estimated one-fifth of the state's voters. Excerpts from an address by Mormon official Roger Hunt of Las Vegas, widely circulated among members of the faith, claims that ERA will wipe out "protections" women now enjoy from divorce laws, as well as pregnancy leave, rights of privacy and exemptions from the military draft.

The ERA ballot issue in Nevada is the first test of the proposed constitutional amendment since Congress earlier this month added 39 months to the original seven-year period for states to ratify the measure.

For this reason, the issue is considered crucial by both sides. Though the Nevada ballot measure is only advisory, so many legislators have promised to abide by the results that the vote is considered almost certain to determine the outcome of ERA in Nevada.

A victory here would be particularly significant for ERA advocates, who, even with the extension, may have difficult time finding the three more states needed to make the amendment part of the Constitution. Thirty-five states have ratified thus far.

Since ERA expectations in Nevada are low, approval here would be certain to give supporters a much-needed boost.

And while the prevailing view here is that the ERA initiative will fail, some think the issue will be very close and that passage of the advisory issue is possible.

***Reno Evening Gazette*, March 7, 1978**

LEAVITT AIRS VIEWS ON ERA

FILES FOR LIEUTENANT GOVERNOR

[Photo
Appeared
Here]

Myron Leavitt

By LEE ADLER
Gazette-Journal—Carson Bureau

Las Vegas City Commissioner Myron E. Leavitt Monday filed for the Democratic nomination for lieutenant governor, saying he would break a possible tie vote in favor of the Equal Rights Amendment if a majority of Nevada voters favor it in November's advisory referendum.

The 47-year-old Leavitt explained that he opposes the anti-sex discrimination both "because it's not good law and because it's vague and ambiguous.

But he said he would vote for it if most of the voters do because "I believe in representative democracy."

Lieutenant Governor Bob Rose generated considerable controversy during the 1977 season by casting the tie-breaking vote that enabled ERA to pass the state Senate en route to a defeat in the Assembly.

Leavitt said Monday he agrees that Rose has the constitutional right to break such ties and he would do the same if he were elected.

Like a growing number of Democrats, Leavitt said he favors some form of tax relief, whether it be a cut in property taxes or sales tax.

He said the state's estimated $60 million surplus "is too much" and some of it should be returned to the people.

Leavitt then qualified his statement saying tax relief should be granted only when "we've made sure the surplus isn't artificial, is one that we can look forward to in the future.

At any rate, he said, the state should retain a bedrock $20 million to $25 million surplus in order to be equipped to handle unforseen emergencies.

Leavitt, who lost to James Santini in the 1974 Democratic congressional primary, estimated it would cost him $113,000 to win the nomination as lieutenant governor.

He said he will campaign by "meeting as many people as I can, shaking as many hands as I can."

He said also he favored expanding the role of the lieutenant governor to include such things as taking charge of the Office of Economic Development, which works in part to bring more business and industry to the state.

He said he also favors the lieutenant governor continuing in his role as president of the state Senate.

Leavitt holds a journalism degree from the University of Nevada and a law degree from the University of Utah.

He has served as deputy city attorney of North Las Vegas; Las Vegas Justice of the Peace; chairman of the Clark County Commission; and a member of the Las Vegas Metropolitan Police Commission.

To date, Carson City resident Olga Bond Covelli is the only other Democrat to officially enter the race.

Rose has said he is seeking the governorship.

Assembly Line

A Special Report From Assemblyman Bob Robinson

In the spring of 1976, I initiated a policy of sending a report to the residents of Assembly District 8 to advise you of major actions of the Nevada legislature.

This report is designed to outline many of our actions and, hopefully, to encourage your comments and opinions. I would appreciate having your thoughts about the matters outlined in this report or any other actions taken by the legislature.

Fiscal Responsibility

The 1977 Nevada legislature continued to exercise fiscal responsibility, which has resulted in Nevada being one of the most financially sound states in the nation.

We were able to fund a number of greatly needed projects and programs. Not only did we do so *without any increase in taxes*, we are anticipating a budget surplus of more than $50 million by the time the legislature meets again a year from now.

We authorized $58 million for capital improvements throughout the state—at the University of Nevada, Las Vegas, University of Nevada, Reno, our community colleges, and $8 million to improve our prison facilities at Jean and Carson City.

We also cut several million in requests for capital improvement funds for national guard armories.

Additionally, we created and appropriated funds for two new state parks—including the Tule Springs Park not far from our district.

Consolidation

One of the most controversial measures considered by the legislature was whether to consolidate city and county government in Clark County.

Since few matters so greatly affect all of us as our system of government, we decided that the residents of the City of Las Vegas and the residents of those unincorporated areas which would be added to the City of Las Vegas under consolidation should ultimately decide whether they want a new and consolidated government.

That question will be on the ballot in the *primary election* in September. If *both* the people of the City *and* the residents of the unincorporated areas vote in favor of the issue, we will have a consolidated government.

I felt it best that the people directly affected should have the final decision about what kind of government they support.

Equal Rights Amendment

A second question will be voted on directly by the people next year.

On the *general election* ballot in November you will be asked to vote for or against the Equal Rights Amendment (ERA).

Clearly the most controversial issue of the last two legislative sessions, ERA has three times been defeated in Nevada—by the Senate in 1973 and 1975 and by the Assembly in 1977.

In my view, much more heat than light has been shed on this issue in the last few years and I believe that because of the controversy and strong feelings surrounding the issue, it should be taken to the people.

My position is clear—if a majority of the voters of Assembly District 8 oppose the issue, I will vote against it if I am returned to the Assembly in 1979; if a majority supports it, I will support it also. I will vote the position taken by a majority of our District.

Government Bureaucracies

Landmark legislation was passed which will have significant effect on those government workers who sometimes believe they can write into government regulations matters not intended by the legislature.

The sweeping and landmark legislation provides that all government regulations be codified as are our Nevada Revised Statutes, and that no regulations promulgated by an agency become effective until approved by the legislature or the Legislative Commission.

This is a most welcome step toward stopping the ever-increasing authority of bureaucrats.

Downtown Convention Facility

In the closing weeks of the session, we passed legislation to provide for a convention facility and sports complex in downtown Las Vegas.

This facility would benefit our local citizens and our many tourists alike.

Of more importance, it will not cost any local resident one penny!

Energy

The challenges of conserving energy and finding new sources of energy for the future are not confined solely to the federal level.

In Nevada, we have created a new State Department of Energy. Moreover, we passed this year some 17 bills on the subject of energy.

More on this critical subject will be tackled by the next session of the legislature.

Education

The largest single area of expenditure of our state budget is for education.

Appropriations for our school systems was up 13 per cent per pupil in 1977-78 and will increase 8 per cent more in 1978-79.

We mandated a new program this year to help insure that everyone—students and taxpayers—are getting a proper return on the education dollars spent.

The new program requires passage of achievement tests by a student in order to receive a high school diploma.

Nevada Appeal, Tuesday, January 31, 1978

ERA Supporters Handed Setback In Court Ruling

By United Press International

District Judge Mike Fondi Monday handed supporters of the Equal Rights Amendment a setback when he ruled the question could be submitted to the voters in November in a straw ballot.

Fondi held the 1977 Nevada Legislature acted within the law in calling for a statewide advisory opinion on ERA which has been defeated in the last three sessions.

Mrs. Phyllis H. Atkins, Reno attorney for those backing ERA, said the case would be appealed immediately to the Nevada Supreme Court in an effort to keep the question off the ballot.

Lawmakers, tired of hearing conflicting opinions about the attitudes of Nevadans, approved a law putting the question on the ballot but the results would not be binding on the 1979 Legislature.

A group of persons from Washoe County, including Isabel Kimbell and former Assemblywoman Mary Frazzini, sought to have the law declared invalid and the question removed from the ballot.

Fondi said the law violates neither the U.S. or Nevada Constitutions. He said however it would have been invalid if the outcome of the election would have been binding on the 1979 Legislature.

But Fondi pointed out lawmakers may be elected entirely of one view and the voters may express another. Yet the legislators can vote how they want.

Deputy Attorney General Donald Klasie and Legislative Counsel Frank Daykin both suggested the Legislature could

pass any law it desires as long as it was not expressly prohibited by the state and federal constitutions.

Klasic said the lawmakers wanted to get acquainted with the feelings of the voters and this was better than the "hit and miss" of opinion polls and lobbyists.

Daykin questioned the legality of the pro ERA group to bring the suit. Judge Fondi said he could take the easy way out and dismiss the suit on legal technicalities. But he said the group had legal standing to bring the suit and there was a justified controversy.

The judge said it was "very evident we will have the Supremes make the final decision because of the issuing and the importance of it."

Mrs. Atkins said amendments to the U.S. Constitution can be ratified only by the legislatures of the states or a constitutional convention. She said the voters do not enter into this process. She argued it was a useless law and it does not bind the lawmakers to follow the results.

"Courts have kept these types of questions off the ballot," she said. She added the legislature could not delegate its power to the people in ratification of a U.S. Constitutional amendment.

"The 50th session is using taxpayers money to lobby the next legislature," she complained.

But Daykin replied the 1977 Legislature did not take a position and did not require the 1979 session to follow the results so this was not lobbying.

In making his decision, Fondi said many laws on the books have non-binding effects on people and that reason alone does not make them invalid. He agreed the U.S. Constitution sets out the method for ratifying constitutional amendments.

But the judge said in this case the advisory vote was not part of the ratification process of the U.S. Constitution.

After the decision, Attorney General Robert List issued a statement praising the ruling and said, "Now for the first time, the people who are going to be affected by the ERA, whether it is adopted or now, are going to have a voice in it. That's the way it should be."

He said the lawmakers have a duty to know the interests of their constituents. "Now they are going to have that loud and clear on Nov. 7. Some politicians, both for and against the ERA, are going to be displeased with this decision."